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Gregory T. Miller

University at Buffalo School of Law (Student)

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COMMENT

Behind the Battle Lines: A Comparative Analysis of the Necessity to Enact Comprehensive Federal Products Liability Reforms

GREGORY T. MILLER†

INTRODUCTION

As of late, one of the more fertile battlegrounds in American law has been in the area of products liability. Presidential candidates, Congressmen, commentators, legal scholars, lawyers, and everyday citizens have been drawn to the battlefield in order that each may choose a side and draw blood in this war of attrition. Accordingly, the fight to federalize products liability law has been a particularly passionate one, and each side continues to struggle valiantly to obtain victory 'for the American people.'¹

Both sides have gone to great lengths to show why their side of the issue is pro-Main Street and why the opposition's view is not. So pervasive is the issue of products liability reform that President Clinton felt it necessary during the first Presidential debate to explain his rationale for vetoing the legislation that came across his desk in late 1996.² Regardless of whether

† J.D. candidate, May 1997, State University of New York at Buffalo School of Law.

1. Not surprisingly, each side in this debate—those who wish to federalize products liability law (the reformers) and those who oppose it—claim that special interests dominate the others' position, but not their own. For example, the reformers' camp contends that the trial lawyers have poisoned the opponents' viewpoint, and the other side claims that big business has swayed the reformers with their monetary clout.

2. In rebutting Senator Dole's contention that special interests played a significant role in his veto of the bill, President Clinton offered the following explanation:

I had a person in the Oval Office who lost a child in a school bus accident where the drunk driver caused the accident directly, but there were problems with the school bus. The drunk driver had no money. Under this new bill, if I had signed it, a person like that could never have had any recovery. I thought

the proponents or opponents of reform have a hidden agenda controlled by special interests, one fact remains perfectly clear—above all else, this debate became, and has remained politically driven.³

Of course, politicking and posturing are nothing new around the halls of Capitol Hill, and tort reform legislation itself has had an extensive history within Congress over the past fifteen years.⁴ However, one fact does remain clear about this most recent incarnation of reform: its genesis lies in the general dissatisfaction among the American public that pervaded the country throughout the midterm election year of 1994.

Frustrated citizens all across the nation felt it necessary to make a change, and the result was a watershed election in which the Republican party gained control of both houses of Congress for the first time since the early days of the New Deal. Out of this election came the now (in)famous Contract with America, complete with a promise to remedy the defects of the products liability system.⁵

that was wrong. So I gave four or five examples to the Congress and I said, prove to me that these people could recover, but we're going to eliminate frivolous lawsuits, I'll sign the bill.

First Presidential Debate (telecast on NBC, Oct. 7, 1996).

3. Carl Bogus, in an intriguing article entitled *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. Rev. 1 (1995), provides an interesting insight into the reformers' message. He claims that referring to this endeavor as "reform" evokes a certain progressive connotation to this undertaking while the actual goals of the reform measures are rather reactionary in ideological terms. *Id.* at 5 n.15. This anachronism serves to point out how intensely political this debate has become in recent years.

4. Legislative involvement on the issue of products liability reform has a long track record that extends back to the 97th Congress. This proposal, and one almost identical to it in the 98th Congress, passed in committee but were the subject of no further debate before Congress adjourned. *See* S. REP. NO. 69, 104th Cong., 1st Sess. 15 (1995). Subsequent attempts at tort reform were made, and in late 1985, the Senate consolidated several proposals and hearings were held on this bill in early 1986. After an extensive period of bill markup in committee, the bill was introduced to the Senate, and the Senate agreed to the motion to proceed. No further action on this bill was taken. *Id.* at 16.

Action on reform measures was also taken by the House of Representatives in the 100th Congress. Extensive committee work was done on the bill in 1987 but the House adjourned before considering the bill on the House Floor. *Id.* Action was then taken by the Senate in the 102d and 103d Congress, but motions to invoke cloture on the floor during both sessions met with defeat. *Id.* at 17. *See also* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. Rev. 479 (1990).

5. Tenet Nine of the Contract was initially much broader than the bill that was eventually presented to the President, and included securities litigation reform and the "Attorney Accountability Act." These other two pieces of legislation also passed through

Regardless of the historical underpinnings of and the renewed interest in reform, many issues have been raised which cut to the very core of the doctrine of products liability law. It is, therefore, incumbent upon those in a position of power vis-a-vis this debate to understand how products liability law as a whole works within the American system before addressing the threshold question of whether or not the system is in need of repair. Operating from the assumption that the system is flawed in some respect, we are next confronted with the equally basic question of whether, despite its inherently flawed nature,⁶ we are in a position to fix it by way of federal legislation. It is this latter question that forms the basis of this Comment.

In Part I, the discussion centers upon the reformers' contention that there has been an explosion of litigation in the past thirty years which justifies an intrusion into states' rights. Part II focuses upon the issue of punitive damages and provides an in-depth look at the opposing viewpoints, and each side's respective conclusions on the matter. Part III presents and dissects the charge that American companies are placed at a competitive disadvantage in the marketplace by the current system. It also offers an alternative explanation of why competitiveness is even an issue in the reform debate.⁷ Part IV of the comment draws some conclusions regarding the subject matter laid out in Parts I—III.

Congress and the former was enacted into law during the 104th Congress.

6. Even those opposed to tort reform are forced to concede this point, however, they do so grudgingly they do it. Consider the following quote offered by Larry Stewart, former president of the Association of Trial Lawyers of America: "[W]ell, now it [the current products liability system] is a human system, and it can always be made better." Interview of Larry Stewart & Representative Richard Goodlatte by Cal Thomas (Telecast on CNBC, Mar. 8, 1995).

7. I have deliberately chosen to refrain from an in-depth discussion of the issue of Federalism in this context for a number of reasons. First and foremost, discussions of the application of the Tenth Amendment are perhaps more theoretical than factual, and as such, any discussion of these issues would compromise the functional approach taken by this comment. Second, the issue itself has generated an intense amount of debate for which I am ill-prepared to comment. For a comprehensive overview of this issue, see Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917 (1996); Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE J. ON REG. 227 (1996); Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE J. ON REG. 429 (1996); and Stephen D. Sugarman, *Should Congress Engage in Tort Reform?*, 1 MICH. L. & POL'Y REV. 121 (1996).

I. WHAT CRISIS?

A. *The Hard Facts Regarding the "Litigation Explosion"*

The idea of a civil litigation explosion has gained widespread public acceptance in recent years as big business, the popular press, and many influential public figures (most notably, our elected officials) have teamed up to spread the message that products liability reform is necessary. Not surprisingly, this approach has produced in the populace a general feeling of animosity toward a civil justice system that few understand.⁸ Indeed, these attitudes have become more entrenched in the 1990s as the positive perception of lawyers has sunk to an all-time low.⁹ Correctly interpreting public opinion, the proponents of reform successfully juxtaposed their message against this back-

8. An especially poignant observation that reflects this observation was offered by the head of the National Labor Relations Board in a commencement address at The Ohio State School of Law in 1995:

Only two years ago, a National Law Journal Poll showed that only five percent of parents . . . wanted their children to be attorneys. Undoubtedly, this unpopularity is what has fueled a number of the legal initiatives undertaken by the Republican Congress to the effect, for instance, *that the loser in litigation should pay all costs, that caps be devised for punitive damages, etc.* [sic] (emphasis added).

1995 WL 297824 *4 (N.L.R.B.).

While opponents on both sides of this issue could go around and around discussing the exact cause-and-effect relationship implicated here, it is sufficient in this instance to realize that a relationship between these factors can reasonably be said to exist. Other critics have also picked up on the link established between public perception of lawyers and reform initiatives—consider the following quote offered by Henderson and Eisenberg: "[I]ndustry leaders have characterized products liability lawyers and clients as a 'plague of locusts' who 'have brought a blood bath for U.S. businesses and *are distorting our traditional values.*" Henderson & Eisenberg, *supra* note 4, at 481 (emphasis added).

The strategic usage of the italicized language forces the hand of the legislator in two ways. First, it forces him/her to be responsive to the business interests located within his/her district or state. Secondly, it demands that he/she "stand" for traditional values. Through the successful (albeit strained) linkage of these two concepts, business leaders have made the choice easy for the individual legislator. Since traditional values and support for the current products liability system (i.e. lawyers) are now seen as mutually exclusive, the legislator's choice is really no choice at all. Unfortunately, the net result could be the total upheaval of a system prompted by insufficient data and spurious claims.

9. The 1993 National Law Journal Poll found that 60 percent of the survey participants had either a 'fair' or 'poor' overall impression of lawyers today. NAT'L L.J., Aug. 9, 1993, at 1, 22. Additionally, "[a] 1993 ABA poll comparing public attitudes toward nine professions ranked lawyers third from the bottom, ranking higher than only stockbrokers and politicians. . . ." 1995 WL 297824 *5 (N.L.R.B.). "The [percentage] of people who said that lawyers are 'less honest' than most people nearly doubled from the 1986 [National Law Journal] poll [31 percent, as opposed to 17 percent in the 1986 poll]." NAT'L L.J., Aug. 9, 1993, at 1, 20.

drop of animosity, and have managed to direct the public's ire toward product liability litigation. The messengers of reform have realized that disenchantment with the civil justice system has spread,¹⁰ and there is ample opportunity to exploit those feelings. Business leaders and other reformers seized upon this readily identifiable and highly visible area of the law, and the fuse was lit. The synergistic reaction it created has pushed Congress to the brink of enacting sweeping legislation that will overturn two hundred years of common law development. A concise and telling exposition of the perception of this field of law is offered by professors James Henderson and Theodore Eisenberg of Cornell Law School: "[t]he overall impression is one of an area of judge-made law on the rise, threatening to engulf the legal system, harming industry, and requiring legislative reaction."

...¹¹

Contrary to this opinion, recent scholarship indicates that the real problem with the tort recovery system in the products liability context lies in direct contravention to the well established heuristics that the general public has adopted en masse.¹² For example, in an article written by Richard Abel in 1987, the author asserts that the real problem of the tort recovery system lies in the fact that it "fails to compensate needy, deserving victims."¹³ Further, he states that this low level of accountability has undermined one of the primary goals of the tort system. He argues that because lawsuits are so rare when compared with the amount of potential meritorious claims, the system fails to

10. This is not to suggest that there has been an attack across the entire spectrum of civil litigation. In fact, the reformers' message has been carefully tailored to limit itself to the narrow berth of products liability litigation. See generally S. REP. NO. 69, at 58 (1995) (dissent). As the most easily understandable and ascertainable component of the civil justice system, it is within the grasp of reformers to manipulate available data to sway public opinion. Considerable force is given to this argument when one considers another archetype of commercial litigation that has yet to come under attack despite its much broader yet well hidden ramifications on the American economy: "Contract cases . . . have increased by 232 percent over the period [between] 1960 [and] 1988. . . ." H.R. REP. NO. 64, at 38 (1995) (dissent) (emphasis added). Considering that contract filings "[comprise] 18.4 percent of all civil filings," H.R. REP. NO. 64, pt. 1, at 38 (citing Marc Galanter & Joel Rogers, *A Transformation of American Business Disputing? Some Preliminary Observations*, Working Paper (University of Wisconsin Institute for Legal Studies, 1991)) it seems logical that some attention ought to be paid to this area of civil litigation, rather than allocating too much time attempting to reinvent a products liability system that, despite its flaws, remains essentially viable.

11. Henderson & Eisenberg, *supra* note 4, at 481.

12. See, e.g., Richard J. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987). See also Henderson & Eisenberg, *supra* note 4, at 480.

13. Abel, *supra* note 12, at 447.

exert a proper deterrent effect upon the manufacturer.¹⁴

The unfortunate results that stem from a tort system in which underclaiming is a chronic problem is that there is simply no economic advantage inherent in adopting safety features which cost more than the benefits they produce. The economic reality all manufacturers face is that they are forced to produce a product as efficiently as possible or the market will force them out.¹⁵ A manufacturer would "have to discount the threat of tort liability by ninety-eight percent in deciding how much to spend on safety."¹⁶ Abel is quick to point out that "[t]his is not a matter of individual choice"¹⁷ and that "[a]n entrepreneur who fails to cut safety costs whenever the tort system allows such savings will be put out of business by a competitor who does."¹⁸

Abel's findings have been confirmed by the Rand Corporation in a 1991 report that stated that "only 10 percent of persons that are injured by defective products seek some form of compensation through the tort system," and a mere two percent actually file a lawsuit.¹⁹ The report also states that merely seven percent of the total amount of monetary compensation paid out to injured victims "is paid through the tort system."²⁰ Further, the National Center for State Courts, an organization that tracks state court cases, in a study released in March 1994, found that only four percent of all state court tort filings are product liability cases.²¹ "Tort filings, in turn, are only 9 percent of all civil filings, and civil filings are only 27 percent of all filings."²² By simple computation, all products liability filings constitute $(.04) \times (.09)$ or .36 percent of all civil filings in the state

14. *Id.* at 460. See also *infra* note 56 and accompanying text (discussing the rightful role of punitive damages in this context).

15. See Abel, *supra* note 12, at 460.

16. *Id.* This figure is supported by data that indicates that less than 10 percent of all eligible claimants file claims after they have been injured by a manufacturer's product. *Id.*

17. *Id.*

18. *Id.*

19. S. REP. NO. 69, at 58 (1995) (dissent) (citing Deborah Hensler, RAND CORPORATION, INSTITUTE FOR CIVIL JUSTICE: COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES, at 18 (1991)).

20. S. REP. NO. 69, at 58 (dissent). The remaining 93 percent is paid through settlement negotiations and insurance carriers. *Id.*

21. *Common Sense Product Liability Reform Act, 1995: Hearing Before the Subcomm. on Commerce, Trade, and Hazardous Materials*, 104th Cong. 29 (1995) (prepared statement of Larry S. Stewart, President, Association of Trial Lawyers of America) [hereinafter *Stewart Statement*].

22. *Id.* See also NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: 1992 ANNUAL REPORT 16 (1994).

courts for 1992.²³ Carrying this computation a step further, we can multiply the percentage of civil findings in terms of all filings (27%) by the percentage of products liability filings (.36%) to obtain the percentage of the products liability cases with respect to the total number of cases filed in state courts. By so doing, we find that products liability filings account for .097% $[(.27) \times (.0036)]$ of the total filings in state courts in 1992.²⁴

The report also contained evidence that "[s]ince 1990, the national total of state tort filings has decreased by 2 percent."²⁵ Similarly, Professor Marc Galanter reported that "excluding the unique case of asbestos, the number of product liability filings in federal court declined 36 percent from 1985 to 1991."²⁶ This hard data clearly undermines the anecdotal evidence that proponents of reform have forwarded in support of their effort to "reign in" the civil justice system.²⁷

B. *Trial Juries are not "Out-of-Control" and in Need of Guidance from the Federal Government*

Another plank of the reformer's platform has been to assert that within the confines of the "explosion of litigation" there have been several other disturbing trends that have exacerbated the problem and heightened the need for reform. The proponents of reform have contended that trial juries have run amok in both the amount of pro-plaintiff verdicts reached and the compensation awarded the successful plaintiff.²⁸ They have garnered support for their positions with stirring references to highly publicized cases.²⁹ However, a hard look at the data com-

23. *Stewart Statement*, *supra* note 21, at 29.

24. *Id.*

25. H.R. REP. NO. 64, at 38 (1995) (dissent).

26. *Id.* (citing Marc Galanter, *Pick a Number, Any Number*, *LEGAL TIMES*, Feb. 17, 1992, at 26, 27).

27. H.R. REP. NO. 64, at 37-40 (dissent).

28. This contention has also been forwarded by the reformers as a basis for capping punitive damages. For a more detailed description of the central arguments for and against placing arbitrary caps on punitive damages awards, see *infra* Part II.

29. *Liebeck v. McDonald's Restaurants, P.T.S. Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994), is a favorite example offered by those who seek to reform the system by claiming that jury awards are excessive and ridiculous. For a description of the facts influencing the trial jury's award of \$160,000 in compensatory damages and \$2.7 million dollars in punitive damages, see *infra* note 59.

Other examples have been reported on by the media:

[During a] debate on legal reform, [former Attorney General Edwin Meese] pointed to a case where a 'burglar' was allowed to sue a school district after falling through a skylight. What Mr.Meese didn't say [was] that the 'burglar' was a teenager who had climbed up to get a lightbulb from a rooftop lamp so

piled by corporations, scholars, and governmental agencies often point to the exact opposite conclusion.

A recent article in the New York Times examined the current trends in jury verdicts in the area of tort litigation as reported by Jury Verdicts Research, Inc.³⁰ The research firm found that between the years of 1987 and 1992, the plaintiff's chance of receiving a favorable verdict in a premises liability trial dropped from 65% to 42%.³¹ The study also looked at products liability cases and found that between 1989 and 1993, the percentage of plaintiff's verdicts fell from 59% to 41%.³²

The second indictment leveled at juries in products liability cases in recent years is that the compensation awarded the injured party in successful cases has become increasingly excessive and unpredictable. However, in a follow-up to their landmark 1990 article on *The Quiet Revolution in Products Liability*,³³ Professors Henderson and Eisenberg trace the pattern of jury verdicts from the mid-1960s to the present day and reach a conclusion contrary to these claims.³⁴

he could play basketball, and that the teenager was left a quadriplegic.

Richard B. Schmitt, *Truth Is First Casualty of Tort-Reform Debate*, WALL ST. J., Mar. 7, 1995, at B1.

Another spurious attack has claimed that the Girl Scouts of America are under attack from "predatory lawyers" because of the current system. *Id.* "Some ads relate the number of boxes of cookies the scouts must sell to pay their liability premiums. One . . . group calls the proposed legislation 'the Girl Scout Bill.'" *Id.* However, the director of communications for the organization claims that it "is absolutely not the case" that they have been "barraged with frivolous lawsuits." *Id.*

In fact, these and other extraordinary cases are routinely paraded in front of the public as representative of the current state of the system. Needless to say, appeals to anecdotal evidence and the overbroad generalizations that are created by repeated reference to these 'facts' simply cannot be utilized as a statistically reliable basis for implementing reform measures. Inadequate sample size, lack of randomness in selecting the sample group, and the consequent spurious conclusions drawn from the collected data are but a few of the myriad of technical problems with the reformers' research methods.

30. Richard Perez-Pena, *U.S. Juries Grow Tougher on Those Seeking Damages*, N.Y. TIMES, June 17, 1994, at A1. As is noted in Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 761 n.88 (1992), JVR compiles and analyzes jury verdicts in personal injury cases across the U.S. and considers itself to be the "most commonly cited source of information on American jury verdicts." *Id.*

31. Perez-Pena, *supra* note 30, at A1.

32. *Id.* Figures available from the General Accounting Office [hereinafter GAO] also support this conclusion. See S. REP. NO. 69, at 59 (1995). It deserves to be noted that the overall percentage of cases that reach a verdict are nonetheless a small percentage of the total number of cases filed. Some experts estimate the percentage to be between ten and 15 percent of the total. See Eisenberg & Henderson, *supra* note 30, at 761-62.

33. Henderson & Eisenberg, *supra* note 4, at 479.

34. Eisenberg & Henderson, *supra* note 30, 770-72.

Their findings suggest that the years between 1965 and 1979 were characterized by "near unrelenting" plaintiff success both in number of successful verdicts and increasing mean damage awards.³⁵ From the period 1979 to 1985, the authors assert that jury verdicts began to become more pro-defendant.³⁶ During this same period, they also found that the "mean award level in the bulk of cases, those resolved without trial, followed the earlier decline in median awards and has remained in decline

...³⁷

Thus, for this period, the strong pro-plaintiff bias that characterized the early years of products liability litigation was beginning to soften. The marked decrease in settlement awards supports the contention that the tide had turned. As the success rate of plaintiffs decreased, it is feasible to assume that the market forces began to exert their influence and resulted in a noticeable shift favoring corporate defendants. This assumption is borne out by the increase in the absolute numbers of settlements and the concomitant drop in the mean award for which the plaintiff was willing to settle.

The products liability landscape had seemingly become hostile to plaintiffs in the mid 1980s, and, according to Eisenberg and Henderson that trend has since solidified.³⁸ In characterizing the battle between injured plaintiff and business defendant as a "slaughter," the authors point to the fact that almost all major statistical categories relevant to the discussion have swayed heavily in the defendant's favor.³⁹ "Filings began to plummet; success rates continued to fall . . . [and m]ost measures of awards—means, expected returns, and sums—are down."⁴⁰

Again, data collected and analyzed has undermined the conventional belief that American businesses and consequently, American consumers are being subjected to increased prices and a lower standard of living due to the onslaught of products liti-

35. *Id.* at 770. One possible reason for the increased rates of plaintiff success during this period may be attributable to the effect that Section 402A of the RESTATEMENT (SECOND) OF TORTS (1965) had upon the common law landscape during this time. As judge-made law continued to expand and flourish, so did the plaintiff's chances of being compensated in a products liability case. For a more complete discussion of this issue, see Henderson & Eisenberg, *supra* note 4, at 479.

36. Eisenberg & Henderson, *supra* note 30, at 770.

37. *Id.*

38. *Id.* "From 1985 to the time of the most recently available data, the products battle has been a slaughter." *Id.* at 770.

39. *Id.* at 770-72.

40. *Id.* at 770.

gation. As Eisenberg and Henderson point out, however, although today's plaintiff is worse off than a plaintiff from 1985, he is still better off than the plaintiff of the mid 1960s.⁴¹ They conclude their article by asserting that the trends that they observed in their 1990 article⁴² have "deepened and strengthened" and that whether or not their analyses are accepted, clearly something changed in the 1980s.⁴³

Professors Henderson and Eisenberg's data does not stand alone. Both the General Accounting Office [hereinafter "GAO"] and Professor Marc Galanter have found similar results.⁴⁴ More interestingly, the GAO found, also in direct contradiction to conventional wisdom, that the awards that juries in five jurisdictions across the nation were handing out were neither excessive nor unpredictable.⁴⁵ Specifically, the study revealed that "the size of compensatory awards varied by type and severity of injury in a manner consistent with underlying economic loss."⁴⁶

This demonstrates that at least for those jurisdictions studied, juries approach the prospect of assessing and awarding compensatory damages in a manner that is fundamentally fair and inherently rational.⁴⁷ Professor Lawrence Mann of Wayne State University echoes this statement in a report written in 1989. "Verdicts and settlements in products liability cases are not erratic and appear reasonably related to the economic losses sustained and [the severity of the] injury."⁴⁸

II. THE ROLE OF PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES

A. *The Rationale Behind Punitive Damages*

Beyond any doubt, punitive damages⁴⁹ awards have provided the most fertile ground for attack by proponents of tort re-

41. *Id.*

42. Henderson & Eisenberg, *supra* note 4.

43. *Id.*

44. S. REP. NO. 69, at 59 (1995).

45. U.S. General Accounting Office, "Product Liability: Verdicts and Case Resolution in Five States" GAO/HRD 89-99 (1989).

46. S. REP. NO. 69, at 60.

47. See H.R. REP. NO. 64, at 39 (1995) (dissent).

48. S. REP. NO. 69, at 60. In reaching this conclusion, Professor Mann "surveyed over 2,000 businesses as well as attorneys of record in closed cases for the year 1987" at the request of the Governor of the state of Michigan. *Id.*

49. Punitive damages have been efficiently described as "money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights."

form. Punitive damages have always been closely tied to the contention that trial juries have routinely awarded excessive compensation to plaintiffs in products cases. As such, these 'non-compensatory damages' have become the most obvious target of tort reform legislation.⁵⁰ As the debate around tort reform has become increasingly politicized, the facts and figures used by proponents have seemingly become less and less accurate.⁵¹

Much of the debate has centered upon reformers believing that excessive damage awards (created in large part by awards of punitive damages) have sounded the death knell for the competitiveness and innovation that has been the touchstone of American business for two centuries.⁵² An illustrative example of the tendency of reformers to use hyperbole to lend credence to their argument is demonstrated by the following all-too-common statement: proponents of reform have put the "annual cost of the tort system at \$300 billion."⁵³ Despite the fact that there is simply no data to back up this claim, the point is nonetheless made. The emotive impact of these statements provide an invaluable service to the reformers—it makes the need for tort reform seem imperative to the public. When combined with the publicity generated by recent infamous cases,⁵⁴ public sentiment

David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 364 (1994).

50. Many states have enacted tort reform legislation that has placed a cap on the total amount of punitive damages that can be awarded a plaintiff. In most of the states that have passed such legislation, the cap on punitive damages is set in one of two ways. Either an arbitrary cap is set (somewhere between \$250,000 on the low end (California) and \$1,000,000 on the high end (Wisconsin, West Virginia) or, alternatively, the amount of punitive damages awarded is limited to double the amount of compensatory (economic) damages awarded, whichever is greater.

51. Professor George Shepard of Emory University law school offers an example: "When you look at the tort-reform debate and the evidence that people are using, it is just appalling . . . [t]he numbers are sort of fetched out of thin air." Richard B. Schmitt, *Study of States Finds Tort Reform Sparked Economic Growth, Jobs*, WALL ST. J., Sept. 18, 1995, at B8.

52. "For years, business groups have blamed the legal system for a variety of their economic ills, saying that lawsuits have inhibited product development and hurt the ability of U.S. business to meet foreign competition." *Id.*

53. *Id.* The 1996 Republican presidential candidate, Bob Dole, has interjected himself into this debate, claiming that, in essence, the \$300 billion per year cost of the products liability system is devastating. *Id.* Others have placed the cost of products liability litigation at anywhere between 132 and 150 billion dollars. 142 CONG. REC. H5746-04. "[A]s a matter of fact, Paul Rubin at Emory University says that \$82 billion of the \$132 billion spent on tort liability has been pure waste and that was just for . . . 1990." *Id.* at H4760. This representative did not try to define what constituted 'pure waste.'

54. See *infra* note 57. Much more anecdotal evidence is available in places like the USA Today. Consider the following cases cited in an editorial in that paper on March 6, 1995:

is transformed and the reformers' message is furthered.

This appeal to emotion is not lost on opponents of reform and they have sought to squelch the rising tide of support for reform. They have fired back with claims that the threat of punitive damages has encouraged product safety because it acts as an effective deterrent to actors in a free market.⁵⁵ As former president of the Association of Trial Lawyers of America (ATLA) Larry Stewart has said—"If you put a cap on punitive damages, many defendants will be able to laugh at the threat of punitive damages. It just won't register on their financial radar screen."⁵⁶ While there may indeed be some evidence that leads to that conclusion, the opponents of tort reform would do well to concentrate upon the truth underlying the popular myths that are so abundant as the debate over tort reform escalates.⁵⁷

Notwithstanding the effect that anecdotal evidence has had upon the heart strings of legislators and the public in general,

The Alabama woman awarded \$250,000 in punitive damages even though she wasn't injured and wasn't even present when a gas water heater malfunctioned . . .

The Miami woman awarded \$250,000 after she, having used cocaine and alcohol and splashed herself with gasoline, was severely burned trying to light a barbeque . . .

The Florida theme park ordered to pay 86 percent of a woman's award for injuries received on its "Grand Prix" ride, even though the jury found the park only 1 percent at fault . . .

The tricycle manufacturer who settled out of court for \$7.5 million rather than risk an even more generous jury award over the color of its trikes.

Step Right Up, Place Your Bets Casino Style, USA TODAY, Mar. 6, 1995, at 10A.

55. *Tort Reform: Is a White House Veto Waiting in the Wings?* THE HOTLINE (Am. Pol. Network), Mar. 7, 1995.

56. *Id.* See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1277 (1994), explaining that:

The doctrine of punitive damages is one of the few remedies that can constrain a giant corporation that is willing and able to take advantage of its less powerful "adversaries" . . . The remedy's effectiveness in [detering malicious behavior] stems from its unpredictability. Capping punitive damages would undermine the deterrent effect of the remedy by making it possible for corporations to calculate their maximum exposure and therefore make a profit-based determination as to whether 'really mean behavior' is good business practice.

57. For example, advertisements that were run by reformers in support of their cause cited the *Liebeck* case as a typical example of jury excess. See *supra* note 29. What the advertisement failed to mention—and what the opponents of reform should attack—is that McDonald's served coffee hotter than other eating establishments and that "the company had received over 700 complaints of burns by customers and settled claims for more than \$500,000," yet the company took no action to avoid any further incidents. *Tort Reform*, *supra* note 55. Also not mentioned was the fact that a judge reduced the plaintiff's punitive damage compensation from nearly \$2.9 million to \$480,000 and the fact that the case subsequently settled for an undisclosed amount. *Id.*

the fact remains that caps on punitive damages have received much attention not only at the federal level, but at the state level as well.⁵⁸ As of March 1995, 14 states have placed limits on non-economic (punitive) damages.⁵⁹ Since that time, various other states throughout the country have enacted laws that place upper limits on punitive damage awards. Among these are Illinois,⁶⁰ New Jersey,⁶¹ North Carolina,⁶² Oregon,⁶³ and Texas.⁶⁴ That the individual state legislatures feel the need to enact this legislation is significant, but other serious issues are implicated when federal legislation is proposed in this area. Legislation that contemplates wholesale changes to a system that has been in place for over 200 years demands a critical analysis of the available data. Beyond this analysis, these changes also require a careful balancing to determine whether the goals of the legislation comport with the available data. Without truthfulness in this endeavor, it becomes a very real possibility that the reforms enacted will not meet the goals they are intended to achieve.

B. *The Opposition's Argument in Favor of Punitive Damages*

As alluded to above, the debate for reform has become highly politicized and increasingly emotional. There are a number of presumptions underlying the reformer's calls for a retooling of the non-economic compensation awarded successful plaintiffs. Chief among these are the claims that "punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards has been rapidly increas-

58. It should be noted that those who oppose federal tort reform legislation also oppose state tort reform legislation. However, the problem faced by broad sweeping federal action as opposed to state action promotes different concerns.

59. H.R. REP. NO. 276 (1995).

60. ILL. COMP. STAT. ANN. 735/5.2-1115.05 (West 1995) (capping punitive damages at three times the amount awarded for economic damages). Recently, an Illinois state appellate judge declared this statute unconstitutional on the basis that the states' attempt to cap all forms of recovery violated the Due Process Clause of the XIV Amendment.

61. N.J. STAT. ANN. §§ 2A-15:5.13 and 5.14 (West 1995) (§ 5.13 reconfigures the percentages of joint and several liability of manufacturers and § 5.14 sets a cap on punitive damages equivalent to \$350,000 or 5 times compensatory damages, whichever is greater).

62. N.C. GEN. STAT. § 1D-25 (1996) (limits punitive damages to \$250,000 or three times compensatory damages, whichever is greater).

63. OR. REV. STAT. §§ 18.537 and 18.540 (1995) (caps attorneys fees at 20 percent of punitive damage awards and requires a plaintiff to prove "malice" and "conscious indifference to the . . . welfare of others").

64. TEX. CIV. PRAC. & REM. § 41.008 (West 1995) (punitive damages capped at two times economic damages plus noneconomic damages up to \$750,000 or \$200,000—which ever is greater).

ing; and these phenomena are national in scope."⁶⁵ All of these factors tend to point to a justice system in crisis—and in desperate need of immediate reform. Such claims have even been bolstered by attempts to manipulate data in an effort to gain support for the reform movement.⁶⁶ These characterizations have led to the current limitations that may be placed on punitive damages by section 108 of H.R. 956.⁶⁷

65. *Product Liability Fairness Act, 1995: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism*, 104th Cong. 505 (1995) (testimony of Dr. Stephen Daniels, Senior Research Fellow, American Bar Foundation) [hereinafter *Daniels Statement*].

66. In particular, Dr. Daniels points to the efforts of some reformers to characterize their findings in a certain light. More specifically, he draws into question two articles written by Richard J. Mahoney, the chairman and CEO of Monsanto, Inc. and another article coauthored by Mahoney and Stephen E. Littlejohn. Littlejohn is the Public Affairs Director for Monsanto. *Id.*

67. Section 108, in pertinent part, states:

(A) General Rule—Punitive damages may, to the extent permitted by applicable state law, be awarded against a defendant [in a product liability action that is subject to this Title] if the claimant establishes by *clear and convincing evidence* that conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others was the proximate cause of the harm that is the subject of the action in any product liability action.

(B) Limitation of Amount—

(1) In general—The amount of punitive damages that may be awarded in an action described in subsection (A) may not exceed the greater of—

(A) 2 times the sum of the amount awarded to the claimant for economic loss and noneconomic loss; or

(B) \$250,000.

...

(3) Exception for insufficient award in cases of egregious conduct.—

(A) Determination by court.—If the Court makes a determination, after considering each of the factors in subparagraph (B), that the application of paragraph (1) would result in an award of punitive damages that is insufficient to punish the egregious conduct of the defendant against whom the punitive damages are to be awarded or to deter such conduct in the future, the court shall determine the additional amount of punitive damages . . . in excess of the amount determined in accordance with paragraph (1) to be awarded against the defendant in a separate proceeding in accordance with this paragraph.

(B) Factors for consideration.—In any proceeding under paragraph (A), the court shall consider—

(I) The extent to which the defendant acted with actual malice;

(II) The likelihood that serious harm would arise from the conduct of the defendant;

(III) The degree of awareness of the defendant of that likelihood;

(IV) The profitability of the misconduct to the defendant;

(V) The duration of the misconduct and any concurrent or subsequent concealment of the conduct by the defendant;

(VI) The attitude and conduct of the defendant upon the discovery of the misconduct and whether the misconduct has terminated;

However, before the veracity of these four claims is discussed, it is important to understand the rationale behind punitive damages. "Today, an award of punitive damages is predicated upon behavior by the defendant that can be characterized as malicious, wanton, willful, oppressive, or outrageous."⁶⁸ There is generally little debate on this issue, and despite almost universal agreement on the purposes of punitive damages, a philosophical debate continues to be waged about the appropriateness of the purposes of punitive damages.⁶⁹

(VII) The financial condition of the defendant; and

(VII) The cumulative deterrent effect of other losses, damages, and punishment suffered by the defendant as a result of the misconduct, reducing the amount of punitive damages on the basis of the economic impact and severity of all measures to which the defendant has been or may be subjected, including—

(i) Compensatory and punitive damage awards to similarly situated claimants;

(ii) The adverse economic effect of stigma or loss of reputation;

(iii) Civil fines and criminal and administrative penalties; and

(iv) Stop sale, cease and desist, and other remedial or enforcement orders.

(C) Requirements For Awarding Additional Amount.—If the Court awards an additional amount pursuant to this subsection, the court shall state its reasons for setting the amount of the additional amount in findings of fact and conclusions of law.

H.R. REP. NO. 956 (1995). A bill identical to the one passed by both Houses of Congress was introduced in the Senate earlier this year and is entitled "The Product Liability Reform Act of 1997." 143 CONG. REC. § 163-02, § 226. Section 108 of the bill remains unchanged. *Id.* at § 228-229.

68. *Daniels Statement*, *supra* note 65, at 509. The concept of punitive damages has been firmly entrenched as a manner of compensating victims for the intentional wrongful acts of others throughout the history of jurisprudence. See generally Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993) (tracing origins of punitive damages). In American jurisprudence, the concept of punitive damages as it is commonly referred to today was elucidated by the Supreme Court as early as 1851. *Day v. Woodworth*, 54 U.S. 363, 371-72 (1851). "In actions . . . where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example" *Id.* at 371. Several times over the past five years the Supreme Court has had occasion to review the issue on punitive damages. Twice they have visited cases which emanated out of the Alabama courts. See *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *Gore v. BMW of North America, Inc.*, 116 S. Ct. 1589 (1996).

69. The debate over the usage of "punishment" and "deterrence" principles in a system which does not provide the same safeguards as the criminal system poses some interesting questions at the core of this debate. It deserves to be stated that some state statutes that place a cap upon punitive damages also require a finding of a higher standard of proof than a preponderance of the evidence. See *supra* notes 63-67. These questions go beyond the purview of this Comment and will not be discussed in detail. For an excellent summary of the arguments on both sides of this issue, see *Product Liability*

Whether or not one agrees with the imposition of punitive damages in products liability cases, there is strong evidence that they serve an important purpose in the policing of manufacturers. Despite the infrequency of the use of punitive damage awards in the products liability arena,⁷⁰ an argument can be forwarded that the threat of such damages being awarded deters profit maximizing actors from producing unreasonably dangerous products.⁷¹ A corollary to this argument states that as the risk of financial censure decreases, the rational producer will be willing to take on the risk⁷² and increasingly produce unsafe products.⁷³ "[C]apping punitive damages completely undercuts the valuable market incentive which punitive damages provide. It is only the indeterminable nature of punitive damages which [keeps] a cynical actor from making calculations weighing safety against the cost of compensating injuries."⁷⁴

Fairness Act, 1995: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism, 104th Cong. 508-55 (1995) (prepared statement of Dr. Stephen Daniels, Senior Research Fellow, American Bar Foundation) [hereinafter Daniels Prepared Statement]. For a more intricate treatment of these issues, see generally STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 199-238 (1995); and Stephen Daniels & Joanne Martin, *Myth and Reality of Punitive Damages*, 75 MINN. L. REV. 1 (1990).

70. *Stewart Statement*, *supra* note 21, at 29.

71. This is not to suggest that all manufacturers are bad actors with no social conscience. It is merely assumed that a reasonable actor in a competitive market will always seek to maximize profit whenever possible. If there is no economic advantage inherent in expending more capital for the sake of producing a safer product in the short run (i.e., avoidance of punitive damages), the reasonable actor will seek to lower costs to the bare minimum. The manufacturer who does not produce a widget at the lowest possible (acceptable) cost will be forced from the market by others who produce lower priced widgets because they are willing to forego the added costs of producing a safer product.

72. If one accepts this notion, then it can be assumed that if the financial risk imposed by punitive damages is discounted far enough, it will cease to be an effective deterrent and will be ignored by the manufacturer.

73. This theory supports the notion that manufacturers are willing to 'modify their corporate behavior' in response to an adverse threat. "H.R. [10], by limiting punitive damages to an arbitrary level, would undercut the important behavior modifying effect of punitive damages." *Stewart Statement*, *supra* note 21, at 30.

74. *Id.* at 33. Mr. Stewart argues that not only does the risk of punitive damages act as a deterrent before the harm, but has also led to changed 'behavior' in the wake of a judgment. "For instance, more than 75 percent of the non-asbestos defendants subject to punitive damage awards between 1965 and 1990 took some sort of post-litigation step toward making their products safe, usually in the form of fortified warnings, product withdrawals, or added safety features." *Id.* at 29. It should be noted, however, that Mr. Stewart offered no authority for this point, and may be guilty of the "Pick a number, any number" phenomenon that has enveloped this debate on both sides of the fence to a certain extent. See generally Galanter, *supra* note 26.

Many proponents of reform contend that § 108 of H.R. 956 does not put an absolute cap upon the punitive damages that can be awarded to a successful plaintiff. They point to the language of the section that provides for a ratio rule which should provide for adequate deterrence. Just how that nexus is reached is somewhat confounding. The reformers seem to contend that merely because a 'defective' product may cause an injury to a high-paid executive or may cause an injury that requires an inordinate amount of compensatory damages,⁷⁵ the manufacturer will be sufficiently deterred. This logic simply does not withstand reasoned analysis. "The damage which the defendant actually does may have little or no relation to the size of the money judgment which would be the most effective admonition for the particular case."⁷⁶ It is precisely this economic size of the damage done that motivates businesses to develop safer products. By making it easier for companies to avoid meaningful financial censure, the link between deterrence and punitive damages is broken.⁷⁷

Notwithstanding the economic rationalizations that may fairly be said to explain the behavior of corporate America with respect to punitive damages, the proposed federal legislation also offers another obstacle to the unwary plaintiff. The exact language of H.R. 956 would require the plaintiff seeking punitive damages to establish "by clear and convincing evidence that the harm that is the subject of the action was the result of conduct that was carried out by the defendant with a conscious, flagrant indifference to the safety of others."⁷⁸ Such a standard is a far cry from the "gross and outrageous" conduct contemplated by

75. Section 108 provides for punitive damages equal to: (A) 2 times the sum of (I) the amount awarded to the claimant for economic loss; and (II) the amount awarded to the claimant for non-economic loss; or (B) \$250,000. H.R. 956, 104th Cong. § 108 (1995).

76. Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1181 (1931).

77. According to Morris:

When an act with a vicious tendency happens to result in a small injury the "compensatory" damages are necessarily small. If it must follow that the punitive damages must also be small, the total verdict might be lenient where severity is desirable . . . So the ratio test seems to be an impediment in many cases, rather than a good legal tool. If it has any effect at all, it may limit punitive damage awards when they should be severe, and result in heavy punitive damages when they should be lenient.

Id. at 1182. Of course, it is also necessary to follow the doctrine laid down by the Supreme Court most recently in *Gore v. BMW of North America, Inc.*, 116 S. Ct. 1589 (1996) when determining what punitive damages are appropriate.

78. H.R. 956, 104th Cong. § 108 (1995).

the courts since the mid 1800s.⁷⁹

Swirling about the center of the debate involving the rationale underlying punitive damages lies the central issue: whether, despite all of the rhetoric, a cap on punitive damages is necessary. In response to the dearth of comprehensive information regarding the proclivity (or lack thereof) of successful punitive damage awards, Dr. Stephen Daniels of the American Bar Foundation⁸⁰ conducted a nationwide study in an attempt to determine the current trends in awards for punitive damages. His findings are quite atypical of the popular beliefs promulgated by the proponents of reform. His first study was conducted in the late 1980s and covered data collected for the years between 1981 and 1985 which found that punitive damages were awarded in only 4.9% of the cases reviewed.⁸¹ Subsequently, he conducted a follow up study in which he used a broader database to determine the percentage of punitive damage awards for the years 1988-1990.⁸² There he found that "[o]verall, there were 19,404 civil jury verdicts in the counties [represented. Of those verdicts,] 864 or 4.5% of the total verdicts included a punitive damage award."⁸³ His data also indicates that "[s]uch awards were made in 8.3% of the cases in which

79. See *supra* note 68 and accompanying text. Beyond the fact that it would undoubtedly take innumerable years for the various state supreme courts to determine precisely what the language of § 108 contemplates, this section clearly makes it easier for the manufacturer to avoid liability for punitive damages. Beyond the standard of proof, it is clear that through § 108 Congress has created a loophole that is large enough to pass the entire provision through. The problems of proof that a plaintiff would face in this situation would be enormous. Short of the production and presentation at trial of internal memoranda that implicate the defendant, the plaintiff would not be able to set down the manufacturer's "conscious, flagrant indifference" by "clear and convincing evidence." H.R. 956, 104th Cong. § 108 (1995). When the prospect that many of the subpoenaed documents could be excluded by the attorney-client privilege or its legal cousin, the work product privilege, or be protected under the guise of a trade secret, the prospects of plaintiff success are further lessened.

80. Dr. Daniels stated during his testimony that the American Bar Foundation is an independent legal research firm that is not privately funded by the American Bar Association. *Daniels Statement*, *supra* note 65, at 504.

81. Daniels & Martin, *supra* note 69, at 30-32. Dr. Daniels' data set was not limited to products liability actions—his database was comprised of "25,000 civil jury awards between 1981 and 1985." S. REP. NO. 69, at 62 (1995).

82. S. REP. NO. 69, at 62. Dr. Daniels testimony before the subcommittee was based largely upon his findings in the follow-up study. *Daniels Prepared Statement*, *supra* note 69, at 519.

83. *Id.* at 522. Table 1 of Dr. Daniels' statement to the Senate subcommittee outlines the different jurisdictions that generated the database. Included in this study are 15 states and more than 89 counties. *Id.* at 519-22.

plaintiffs were successful."⁸⁴

When Dr. Daniels restricted his follow-up study database to the jurisdictions used in his original study, the data yielded nearly identical results.⁸⁵ If nothing else, this study suggests that there has not been a substantial increase in punitive damage awards between the early 1980s and the turn of the decade. Based upon this study, it is impossible to assert that punitive damages are anywhere close to being "routinely awarded."⁸⁶ For example, Daniels found only one site where "the punitive damage rate . . . exceed[ed] one-quarter of all successful cases or 15 percent of all money damage verdicts."⁸⁷ Interestingly, this is one finding that is commonly cited as evidence of the need for federal reform. "A main goal of tort reform would be to restrain runaway punitive damage awards."⁸⁸ However, it would seem dangerous to overgeneralize local patterns into nationwide epidemics,⁸⁹ and thereby undertake reform measures that may prove to be undesirable or unresponsive to the needs of the country in the long run.

Others have also studied the trends of punitive damages awards and have divined similar results. In a study conducted by Professors Michael Rustad and Thomas Koenig, the authors "uncovered just 353 punitive awards in products liability cases between 1965 and 1990."⁹⁰ Their findings do not end there—"One quarter of all those awards involved . . . asbestos. Another one quarter . . . was reversed or remanded upon appeal. They

84. *Id.* at 522.

85. "Reducing our 1988-90 database to the same sites used in the earlier study yields a punitive damage rate of 4.8% for all jury verdicts and 9.1% for successful verdicts." *Id.*

86. *Id.* at 523.

87. *Id.* In other words, there was only one jurisdiction (Cook County, Illinois) where punitive damages were awarded in greater than one quarter of all successful trials. The same jurisdiction also accounted for the highest rate of punitive damage awards in successful trials where money was awarded to the plaintiff. For these verdicts punitive damage awards fell to a rate of one in 6.67. *Id.*

88. Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074, 1083 & nn.78-82 (1996).

89. Professor George Priest of Yale Law School, himself a proponent of tort reform in general, recognizes this fact. See *Hearings on Punitive Damages Tort Reform Before the Senate Committee on the Judiciary*, 104th Cong. (1995), available in 1995 WL 149954 (statement of George Priest) [hereinafter *Priest Statement*]. Implicit in his statement is a sense of the need to review representative data in order to reach a valid conclusion about punitive damages reform.

90. H.R. REP. NO. 64, at 39 (1995) (dissent). Their database included all products liability awards from 1965-1990 in both state and federal courts. *Id.* The Supreme Court has touted this study as "the most exhaustive study of punitive damages." *Id.*; see also S. REP. NO. 69, at 62 (1995).

further found that the amount of punitive damages was not skyrocketing.⁹¹ Even in the cases where punitive damages were reported, 35% of those cases involved punitive awards that were lower than the compensatory awards.⁹² The authors of this study echoed Dr. Daniels' statements regarding the amount of punitive damage awards: "[t]here is a widespread misperception that punitive damage awards are skyrocketing because of frivolous lawsuits."⁹³ Given these facts, the argument that punitive damages are a major problem seems somewhat remote. The argument seemingly becomes more remote when one reviews the available data and finds that punitive damages are awarded by juries in only a small fraction of *successful, meritorious* claims.

C. *The Reformer's Position on Punitive Damages*

Thus far, we have undertaken a general discussion of punitive damages, its basis in American jurisprudence, and explored the empirical data within the context of products liability law. Given the findings presented thus far, it might seem mere surplusage to engage in a discussion of the reformers' position. However, mindful of the admonition that overgeneralization can lead to inaccuracy and unreliability, it is evident that such an analysis should be undertaken. The most obvious starting point to mount a counterargument against the opponents' position is upon the merits of their claim about the dearth of punitive damage awards recovered in products liability cases. Very often, numbers such as the ones presented above only begin to tell the story.

As has been noted, only between two and five percent of all civil claims filed in this country reach the trial stage.⁹⁴ It is thus hard to determine the absolute economic effect that our system

91. S. REP. NO. 69, at 62.

92. *Id.*

93. *Id.* at 62-63 (quoting Michael Rustad & Thomas Koenig, *Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts*). In fact, nothing could be further from the truth. Proponents of reform would do well to peruse the 1993 amendments made to the Federal Rules of Civil Procedure [FED. R. CIV. P.]. Rule 11 was specifically amended to limit the number of frivolous lawsuits filed by undeserving plaintiffs, while at the same time *decreasing* the amount of satellite litigation alleging Rule 11 infractions. For an in-depth treatment of both the 1983 and 1993 amendments to FED. R. CIV. P. 11, see Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

94. See *Product Liability Fairness Act, 1995: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism, 104th Cong.* 413 (1995) (statement of Theodore B. Olson, Esq., Gibson, Dunn & Crutcher on behalf of the Civil Justice Reform Group) [hereinafter *Olson Statement*].

of civil justice exerts upon businesses within and without the United States. A more meaningful measure of the cost and effect of punitive damages may be obtained by reliance upon a different set of data. For example, a study which compares the percentage increase in settlement awards in cases where punitive damages are claimed against the settlement awards in cases where punitive damages are not claimed within each type of injury would seemingly afford an opportunity to look more closely at the absolute cost of punitive damages. Along the same lines, some claim that these are the hidden costs in the current system which, when measured, far outweigh the system's utility.

The more provocative question that such a study evinces would be whether or not punitive damages are being awarded in a manner requisite with their intent. If this is the case, then clearly the claim of punitive damages is not being used merely to ask a jury to proscribe a manufacturer's malicious and willful conduct. Instead it is being used maliciously in an attempt to gain leverage in settlement negotiations and throughout the entire litigation process. Making matters worse is that these claims arise out of the adversarial nature of our civil justice system; there simply is no easily discernable way to separate legitimate claims from the illegitimate ones.⁹⁵ In terms of this argument, then, the problems associated with punitive damages seem to go much deeper than products liability reform.⁹⁶

Many of those who testified before the Senate and House of Representatives took the position that products liability is not the only area of civil law that ought to be reformed with respect to punitive damages. "[T]he problem of arbitrary and excessive punitive damages plagues commerce of every shape and form in this country."⁹⁷ Still others believe that a wholesale reform of the "substantive standards of civil liability by federal legislation is necessary."⁹⁸ Whether or not such a huge undertaking is called for, the fact is that it does not appear that the products liability system is representative of the civil justice system as a whole.

95. "The punitive damages system . . . is driven exclusively by private litigants and their lawyers, who have a personal, private interest in the outcome . . . 'A person who is to profit by the punishment of another is likely to prefer severe punishment to admonition which will best serve social ends, and the two are not necessarily synonymous.'" *Olson Statement*, *supra* note 94, at 422-23 (quoting *Morris*, *supra* note 76, at 1178).

96. A statement offered to Congress is instructive: "Of the top 20 punitive damage verdicts in Alabama in 1994, amounting . . . to over \$200,000,000, only one case was a product liability action, accounting for less than 10 percent of the total." *Olson Statement*, *supra* note 94, at 434.

97. *Id.*

98. *Priest Statement*, *supra* note 89, at *3.

The message that the reformers are sending to Congress is that 'if there is not a punitive damages problem in products liability now in terms of volume of verdicts and their consequent dollar amounts, the potential remains; reform today is better than to repent tomorrow.' If there was nothing more for the reformers to hang their hat on than this general argument, the message rings hollow. Nevertheless, a more probing and refined analysis suggests that there may be vitality to this position.

Deterrence is an oft-repeated mantra of those who believe that punitive damages are necessary to curtail abusive, albeit economically rational behavior. Over the past few years this rationale has come under increasing scrutiny. An example is illustrative: It has become evident that the Chief officers of the Ford Motor Company were aware of the potential for harm to individuals driving the Pinto by virtue of the placement of the gas tank prior to the marketing of the vehicle. Despite this knowledge, they consciously chose to forego any design modification.⁹⁹ Thus, it would seem that the possibility of punitive damages did not serve to dissuade Ford from producing an unsafe vehicle. If the profits expected to be made from a product outweigh the expected costs (including the possibility of all types of damage awards), the product will be manufactured. It is only in instances where the cost and/or the profits are miscalculated that such a product will be pulled from the market.

The question that remains is whether or not the Pinto or any other similarly situated product would still be manufactured if there was a cap upon punitive damages, or if punitive damages were altogether nonexistent. Of course, it is impossible to answer this question, but Priest speculates that the answer is "no":

Is there some reason to believe that the payment of full compensatory damages will fail to deter the defendant, such that some further multiple of damages is necessary? . . . Corporate defendants who must maximize their profits net of costs must necessarily take the prospect of compensatory damages into account in determining how to invest in accident prevention. Again, this analysis presumes full compensation.¹⁰⁰

99. "[In the case of the Pinto], an economic calculation was made that 180 violent deaths and 180 additional serious injuries would cost the company less than the \$11 per car necessary to prevent them." *Punitive Damages Tort Reform: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1995), available in 1995 WL 221312, at *24 (statement of Robert Creamer, Director, Chicago Office of Citizen Action).

100. *Priest Statement*, *supra* note 89, at *15.

Further, he believes that full compensatory damages "generate the optimal level of deterrence of accidents—not too little and not too much."¹⁰¹ The only proper role under this economic conception of compensatory damages would be to raise the level of jury verdict awards to a level whereby victims would be fully compensated.¹⁰² Taking this analysis to its logical conclusion, we arrive at a point whereby an injured party is more than justly compensated for his injury by either overcompensation of compensatory damages (economic losses plus pain and suffering), the awarding of punitive damages, or a combination of both. By virtue of a steady diet of any of these situations, society would be worse off due to the increased cost or simple lack of availability of a product that was unjustly forced from the market.

III. THE LEGAL SYSTEM'S EFFECT ON AMERICAN COMPETITIVENESS

A. *The Opponents' Viewpoint*

Closely tied to the reformers' message that the entire products liability system needs to be governed by a single federal statute across the 52 state jurisdictions¹⁰³ is the idea that the current common law system undermines the competitiveness of American companies and discourages research and development of new products for the marketplace. In support of their effort, messengers that tout reform as a way to return American businesses to the fore in the new "global economy" commonly refer to studies which purport to show the devastating economic impact of current products liability law.¹⁰⁴ Invariably, these accusations center around the popular topic of punitive damages and how this system undermines competitiveness. Dr. Daniels refers specifically to a technique he has dubbed as "strategic

101. *Id.* (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992)).

102. One could assume that this level of full compensation would also be in line with the manufacturer's assessment of the same.

103. This figure includes Washington D.C. and Puerto Rico. Legal analysts scoff at the idea that such a statute would create the desired level of uniformity. Individual differences in each jurisdiction would inevitably lead to differing results in different jurisdictions. Given the wide array of issues that are brought to bear in any given case, there is bound to be as much individual variation between jurisdictions as before. It seems as though the reformers' wish to discount the frailty of the human condition in their search for products liability's Utopia.

104. Many of these reformers specifically cite studies which show recent upward trends in punitive damages awarded by juries. Unfortunately, much of their data is based upon erroneous conclusions gleaned from the available data. *Daniels Prepared Statement*, *supra* note 69.

representation."¹⁰⁵

In particular, he points to the *Punitive Damages Update*, a publication that was distributed to various organizations and corporations sympathetic to tort reform proposals.¹⁰⁶ Within one of the mailings, readers were presented with a litany of horror stories meant to appeal to our "prejudices and anxieties" and "direct attention away from alternative explanations¹⁰⁷ that may justify large punitive damage awards and portray defendants as something other than the innocent victims of greed."¹⁰⁸ Though effective, the message fails to stand up to a concerted analysis of the available data. Studies that undertake this type of an inquiry generally result in a much different, and much more reliable set of conclusions upon which to generalize to the society as a whole.¹⁰⁹

At this point, one may well be asking why corporate America would choose to rely on such an indirect method to charge the product liability system with subverting American competitiveness in the domestic and foreign markets. The reasons for this are essentially two-fold: first, by providing a story with enough of an emotive impact, the need for a protracted discussion of the scientific underpinnings of the available data are

105. *Id.* at 512-13. His definition of strategic representation is really nothing more than a politically correct way to allege that there has been a certain degree of improper characterization of the available data.

106. *Id.* at 513. More specifically, he cites a "press kit" that was "mailed to targeted journalists the week prior to oral arguments before the Supreme Court" in a case that challenged the constitutionality of punitive damages. *Id.* This mailing contained data manipulated to portray "the punitive damages system as one so seriously flawed and threatening as to require fundamental change." *Id.*

107. These misunderstandings could range anywhere from "misinterpreted public perception" to "lack of government funding." See Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, 78 A.B.A. J. 44, 48 (1992).

108. *Id.* If public sentiment is any indication, this is the proper technique to use. The press kit included the previously mentioned articles written by the CEO of Monsanto, one excerpt of which stated:

After the longest running trial in America's history a jury in Belleville, Ill., [sic] last year awarded one dollar to each of 65 plaintiffs as nominal damages for alleged personal injuries in a case involving one of my company's products—orthochlorophenol crude—which is used to make wood preservatives. Then, in a burst of tortured reasoning, the jury awarded \$16 million in punitive damages to the plaintiffs.

Id.

109. Dr. Daniels' research is one example of a study based upon proper scientific foundations with conclusions that are supported by the data contained within the study. Another example of the proper scientific method being applied to this topic is offered by Michael Rustad in his article *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992).

kept to a minimum; second, by linking a topic that is unpalatable to the corporations (the threat of unrestricted punitive damages) to a prospect that is troubling to both the constituency and their representatives (the fall of American companies' competitiveness in the world markets), corporate America can use one against the other and drive home the idea of a direct cause and effect relationship. By forcing such a nexus upon the public in general and upon the Congress in particular, the objective is effectively accomplished.¹¹⁰

The argument behind the collapse of American competitiveness can best be summed up as follows: the civil justice system in America "places U.S. businesses at a competitive disadvantage with their foreign counterparts since American companies must spend billions on litigation costs and high insurance premiums."¹¹¹ Corporations thus have "less money for business reinvestment, product innovation, cost-saving measures,¹¹² and other competitive practices."¹¹³ By claiming that they are not competing on a level playing field,¹¹⁴ corporate America is able to once again point to a simple one dimensional cause-and-effect relationship.¹¹⁵

110. One cannot help but speculate how much money these companies save by presenting their argument for reform using anecdotal evidence rather than compiling and analyzing reliable data.

111. *Stewart Statement*, *supra* note 21, at 30. See also *Not Guilty*, *ECONOMIST*, Feb. 13, 1993, at 63; Jost, *supra* note 107, at 45.

112. Such as reducing the amount they pay in premiums to product liability insurance carriers. Even this point is the subject of some contention as Congress heard testimony from the American Insurance Association which stated: "[T]he bill is likely to have little or no beneficial impact on the frequency or severity of product liability claims . . . [A]nd it is not likely to reduce claims or improve the insurance market. 141 CONG. REC. S6370-1, 6402 (Statement of Sen. Kerry).

Furthermore, Sen. Kerry asserts that "over the last decade product liability insurance costs 26 cents per \$100 of retail product sales" and " . . . [S]ince 1987, . . . insurance premiums have dropped by 47 percent, . . . a fact that was confirmed by a 1992 Commerce Department study." *Id.*

113. *Stewart Statement*, *supra* note 21, at 30.

114. The unlevel playing field described by proponents of reform does not exist to the extent that is claimed. "American plaintiffs may face some practical problems in pursuing suits against foreign concerns, but that difference creates no more than a 'moderate advantage' for the foreign competitor against the U.S. firm." Jost, *supra* note 107, at 45.

115. Once again, the reformers appeal to anecdotal evidence to reinforce their contention. An illustrative example is offered by Jost, *supra* note 107, at 46. Apparently, a "study" was conducted whereby 4,000 executives were direct mailed a survey and asked to complete and return it. Approximately 500 responses formed the basis of the study which concluded "product liability concerns had caused 47 percent of U.S. manufacturers to withdraw products from the market, 25 percent to discontinue forms of research, and 15 percent to lay off workers." *Id.* Certainly such dubious research methods demand

While this may provide the "quick fix" that so many apparently want and need, this argument ignores a central component of the equation. As is true of the old algebraic maxim that what you do to one side of the equation, you must always do to the other side of the equation, so must the same be done to foreign competitors. "When a foreign company sells a product that causes injury to a person in the U.S., that foreign company is subject to the same product liability laws as a domestic company."¹¹⁶ Therefore, it stands to reason that not only must a foreign company alter their product to prepare for this potentiality, but they must also necessarily bear the same insurance and developmental costs as their domestic counterparts.¹¹⁷

The picture that the reformers would paint of the current state of liability for personal injury in all jurisdictions outside of the United States could be described as a tort-free vacuum. While it is true that many other countries do not have tort systems directly analogous to our own, there are systems in place that provide the deserving plaintiff with compensation.¹¹⁸ It would be foolhardy to assume that foreign competitors do not contribute to the system of civil justice that has been erected within its borders. In fact, it has been shown that "many coun-

close scrutiny of the database as well as the results. "The flaws in such a study are so substantial and so obvious that no self-respecting legislature should act on its results." Jost, *supra* note 107, at 46 (quoting Theodore Eisenberg).

Given this fact, one can scarcely believe that it still being offered as an authoritative measure of the need for reform. Yet, in his article published in the Maryland Law Review in 1996, former Attorney General of the United States Richard Thornburgh cites this "survey" as a reason why tort reform is necessary. See Thornburgh, *supra* note 88, at 1076 & nn.28-30 (1996).

116. *Stewart Statement*, *supra* note 21, at 139-40.

117. The author is not insensitive to the fact that a much larger number of products are sold in the United States by domestic producers, but the absolute number of units sold will not likely have an impact on the cost of coverage or on the cost to the company to develop a safe product. If a foreign manufacturer decides to compete in the U.S. market, the costs of developing a safer design and the cost of insurance coverage are fixed costs. That is, once this cost is incurred, it makes no difference how many units are manufactured for the U.S. market. (But, of course, it is assumed that the foreign competitor is a rational actor in the market and will only produce until his marginal costs are lower than his marginal revenue). For a more complete treatment of the issues presented by fixed costs, marginal revenue, marginal cost and their effect on production decisions, see Herbert Hovenkamp, *The Basic Economics of Antitrust*, in *FEDERAL ANTI-TRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 2 (West 1994).

118. In a large number of these foreign jurisdictions, the costs of the system appear in the form of compliance to government regulations. Although less visible than the American tort system, the financial burdens can be just as onerous. For instance, "Japan is under pressure from foreign companies to make it easier to sue. These firms prefer more lawsuits to the high costs of complying with Japanese safety regulations." *Not Guilty*, *supra* note 111, at 63.

tries with less 'threatening' tort systems often impose *substantially greater taxes and safety regulations* that result in compliance costs at least as great as any costs imposed by our tort system."¹¹⁹

To describe the arguments made by the reformers regarding the effects of the products liability system upon business strictly in terms of competition does a disservice to their message as a whole. Intimately linked to their competitiveness argument is the idea that research and development of new products is emasculated by the burden imposed by the current system. Insurance premiums and the possibility of punitive damages serve as underwriters to the death of the new products development.¹²⁰ Once again the parade of anecdotes is brought forth to show devastating consequences which range from the vacuum created by the pulling of the drug Bendectin off the market to the decline of drug companies' investment on research involving new vaccines and contraceptives.¹²¹ Accordingly, "a National Academy of Sciences panel has called products liability a major source of the lag in developing drugs for contraception."¹²² Despite the claims to the contrary, there is simply insufficient evidence to support the dismantling of the current system.

In most instances, the threat of liability has been an incentive for manufacturers to conduct more extensive research and put more money into product development.¹²³ W. Kip Viscusi and

119. *Stewart Statement*, *supra* note 21, at 30 (emphasis added).

120. A 1991 book entitled *THE LIABILITY MAZE*, sought to point out just exactly how our civil justice system has eroded the innovative spirit of American business. *THE LIABILITY MAZE* (Peter W. Huber et al. eds., 1991). This book is a collection of articles written by scholars and producers. "[T]he most damning evidence on innovation came from papers on automobiles, pharmaceuticals and general-aviation aircraft, each written by someone with long-standing financial ties to the industry he examined." Jost, *supra* note 107, at 48.

121. There is little doubt that these results have occurred; however, there is some question as to how much of the result is due to fear of litigation and how much is due to fundamental flaws in the product itself. A notable case and point is offered by the Monsanto Corporations' substitute for asbestos. The CEO of Monsanto has for years claimed that a product that they spent years (and untold amounts of money) developing as a substitute for asbestos was pulled from the market before it reached the consumer. The corporation claims that the rationale behind their decision was based solely upon the threat of litigation. However, subsequent documents show that this "safe" alternative to asbestos—calcium sodium metaphosphate fibers—has carcinogenic effects as well. See *Stewart Statement*, *supra* note 21, at 30.

For a more protracted discussion of Bendectin and other products forced from the market, see *infra* Part III.B.

122. W. Kip Viscusi & Michael J. Moore, *An Industrial Profile of the Links between Product Liability and Innovation*, in *THE LIABILITY MAZE*, *supra* note 120, at 81.

123. See *id.* The emphasis of this study was upon the effect of liability upon innova-

Michael J. Moore found that "[t]ort liability, does, however, have safety incentive effects. Higher levels of liability costs usually increase product-related research and development."¹²⁴ Furthermore, they conclude that "[f]or most industries—including such attractive products liability targets as automobiles, pharmaceuticals, and the bulk of chemical industry . . . the costs of product liability provide safety incentive effects that more than offset the product withdrawal effects."¹²⁵

There has also been much discussion regarding the role that liability premiums play in adversely affecting American competitiveness. As the argument goes, the more that a company is forced to pay in premiums, the more it suffers at the hands of those that do not bear such costs. The effect on competitiveness is naturally more severe the higher the cost for the coverage. As will be discussed more fully below, the 1980s were a time when liability premiums were extremely high, and the clamor for reform was based largely upon this fact.

This trend seems to have since abated. Recently, there has been evidence presented to suggest that the cost of liability insurance for all types of accidents—products liability, slip and fall, etc.—does not present an onerous burden on commerce.¹²⁶ During testimony before Congress, J. Robert Hunter stated that "[t]he cost of [all] liability insurance—including self insurance and other non-traditional forms of insurance has dropped . . . on an inflation adjusted basis . . . [over] 20%."¹²⁷ When restricted to products liability, the research showed that insurance costs "represented 19.9 cents per one hundred dollars of retail sales. For a typical five dollar purchase, the cost . . . is less than one cent."¹²⁸

These findings suggest that it is possible that the effects of products liability litigation on insurance premiums are concentrated in a few industries. Although the costs of insurance premiums when spread across the American economy seem minis-

tion. In this endeavor, they correlated industry insurance costs with the total number of patent applications in each industry.

124. *Id.* at 114.

125. Jost, *supra* note 107, at 48 (quoting W. Kip Viscusi).

126. *Product Liability Fairness Act, 1995: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism, 104th Cong. 90 (1995)* (statement of J. Robert Hunter, Director of Insurance for Consumer Federation of America) [hereinafter *Hunter Statement*].

127. *Id.* "Product Liability insurance . . . in inflation adjusted terms has dropped 45% [since 1987]." *Id.*

128. *Id.* The study also found that the *total* cost of all liability insurance amounted to less than 1% of the Gross Domestic Product (presumably for the fiscal year 1994). *Id.*

cule, the effects will still be felt more acutely by those consumers who must rely upon those industries more heavily for their well being.

B. *Products Liability and the Insurance Crisis*

In the opening paragraphs of this Comment, it was mentioned that legislation to federalize the products liability system has had a long history in the Congress. As the years passed and new reform initiatives were proposed, supporters of the bills sought to garner support for their position by linking contemporary problems with the products liability system.¹²⁹ Throughout the late 1970s and into the 1980s, reform minded legislators blamed the "insurance crisis" on products liability litigation.¹³⁰ As the validity of the connection between products liability and the inability of companies to obtain and afford insurance coverage came under increased negative scrutiny, reformers shifted their attack toward more fertile ground.

Much as today's reformers have done, it has been forcefully argued that "at the advent of the so-called tort reform movement, reformers were concerned more with convincing the American public that there was a crisis and linking [it] to products liability, than about the reality of the crisis itself."¹³¹ The clear intention was to garner support and to use any means possible to accomplish that end. "To quote professors Eisenberg and Henderson, 'using every technique of modern media-shaping, tort reform groups sought to assure that the public believed that products liability law was the cause of this threat to our way of life.'"¹³²

Whatever probative effect this argument may have upon the reformers alleged link between competitiveness and products liability law, the main consideration in this section is to provide an alternative explanation of the "insurance crisis." While the existence of this crisis was very real,¹³³ "[t]here is ample evi-

129. *Id.* See *supra* notes 111-15 and accompanying text (addressing the link between products liability litigation and American businesses' competitiveness).

130. S. REP. NO. 69, at 66 (1995).

131. *Id.* at 67.

132. *Id.* (quoting Eisenberg & Henderson, *supra* note 30, at 793).

133. Among the companies hardest hit by the insurance crisis were manufacturers of light aircraft. Early on, critics were quick to point to products liability law as the sole reason behind soaring insurance rates. While it was argued that litigation destroyed this industry, a better analysis seems to be that the system worked as it should. By recognizing that the product was so inherently dangerous and unsafe to the general population, the actor was forced from the market. See generally *Hunter Statement*, *supra* note 126.

dence that the increases in product liability insurance costs were actually the result of the cyclical nature of the insurance industry . . . not product liability."¹³⁴ More directly, the Chairman of the Commerce Department's Task Force on Product Liability stated "no one has ever demonstrated that the huge increases in product liability premiums in recent years were related to the number and/or size of product liability claims."¹³⁵

Reformers have seemingly conceded that the insurance crisis was not due in large part to the current state of products liability law if recent inaction on this issue is any indication.¹³⁶ Even if this contention is proved to be wrong, and the reformers do seek to make this argument again in the future, their argument has been weakened by recent findings of an insurance company (Aetna) that looked at the effects state product liability reform had on the insurance rates within the state.¹³⁷ Despite enacting strict reform measures in products liability litigation, the effect that these reforms had upon insurance rates was listed as "zero."¹³⁸

Regardless of the likelihood that the reformers are correct in their assertions about the cause of the insurance crisis, it may be unwise to fully discount the implications of the insurance company's findings. Having used the state as a "laboratory," an in-depth analysis of the data may reveal whether products liability reform is capable of achieving even the modest benefits provided by lower insurance rates. While this says something about the magnitude of the effect products liability

134. S. REP. NO. 69, at 67. An in-depth analysis of these issues will not be undertaken here, however, an excellent explanation is offered by Congressional Research Service, Property-Casualty Insurance Market Operation, CRS Report No. 85-629E (Mar. 20, 1985). There are also those who view this conception of the insurance crisis as overly simplistic. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law* 96 YALE L.J. 1521 (1987).

135. S. REP. NO. 69, at 67.

136. Inaction does not necessarily preclude reformers picking up the insurance banner, dusting it off, and reutilizing it as a tool to encourage reform at some later date:

The irony of the continuing debate over a federal product liability bill is that insurance costs were emphasized . . . when premiums were high, and were de-emphasized during [latter sessions] when insurance premiums were reduced. In the 99th Congress, the proponents pointed again to the high premiums as justification for a Federal bill, but these arguments disappeared in the 101st and 102d Congresses.

S. REP. NO. 69, at 68. These arguments are nowhere to be found in the final reports of the 104th Congress either.

137. *Id.* at 74.

138. *Id.* The reforms included "eliminat[ing] joint and several liability, limit[ing] non-economic damages to \$450,000 and limit[ing] punitive damages." *Id.*

litigation has upon the insurance industry, it may be indicative of the manner in which products litigation effects American business competitiveness as well.

C. *The Reformer's Viewpoint on Competitiveness*

Standing in stark contrast to the opponents of reform, those who support federal legislation have little doubt that the current system has stood as a barrier to increased American advantage in the foreign and domestic markets. The contentions presented in this section follow roughly the same course as those in the Part II of the paper, but that should be of no surprise; the relationship between these two areas of debate are, at the very least, symbiotic.

As has been shown, one of the main contentions is that the system creates a situation whereby profits are eroded or destroyed by the increased costs of production inherent in the current state law system. Several industries in particular seem to be bearing the brunt of a large percentage of product liability claims. The automobile, light aircraft, and health care industries have been, by their very nature, highly susceptible to products liability litigation. In the interests of economy, the discussion in this section will focus upon the health care industry, with emphasis placed upon the problems encountered by those involved in the research and development and marketing of health care devices.¹³⁹

Two products in particular have had a large role in the push for reform. Both the morning sickness drug Bendectin, and the Copper-7 Intra Uterine Device were forced from the market specifically because the cost of keeping the products on the market in the face of rising litigation costs was prohibitive. In the case of both products, litigation costs swallowed up the revenue generated by their sales.¹⁴⁰ In both cases, the withdrawal of the

139. I have restricted the argument to this segment of the health care field because (1) it provides a fairly representative argument of the concerns of business interests; and (2) it illustrates the interplay between the threat of litigation and its costs (inclusive of punitive damages), insurance costs, research and development, and competitiveness in the market.

140. *Hearings on FDA Approval and Limits on Damage Awards Before the Senate Comm. on the Judiciary*, 104th Cong. (1995), available in 1995 WL 446832 (statement of Janice Toran on behalf of G.D. Searle and Co.) [hereinafter *Toran Statement*]. In the case of the Copper-7 device manufactured by Searle, "only one significant verdict had been rendered against Searle in [this matter] . . . [and] an appeal was pending when the case settled." *Id.* at *9. No verdict was ever entered against the manufacturer of Bendectin. Thornburgh, *supra* note 88, at 1081 & n.49.

product(s) from the market "deprived women of a valuable . . . choice."¹⁴¹ In fact, "the American College of Obstetricians and Gynecologists calls the lack of available drugs to combat morning sickness 'a serious therapeutical gap.'"¹⁴²

The attrition does not end there. Many pharmaceutical companies are reticent to even begin work on much needed drugs due to potential liability.¹⁴³ "The number of U.S. companies doing contraception research has dropped from [eight in the 1970s] to [two] today."¹⁴⁴ Research for an AIDS vaccine seems to have been similarly effected. "[M]any companies have delayed or abandoned clinical trials of promising substances because of fear of liability."¹⁴⁵

That these products have been forced from the market may be either good or bad for the consumer, depending upon the effects noticed in those affected, and the truth of the assertions proffered. More relevant here is that these costs have lead to a decrease in the availability of certain products. The longitudinal effects of this litigation cannot be known for sure, but it does highlight an issue which demands further exploration.

Embedded in this debate lies a fairly typical large firm/small firm problem. While it is true that damage awards levied against larger corporations throughout the country may only amount to a small portion of the revenue generated by them in one year, such is not necessarily the case for the vast majority of small businesses which drive the economy. These smaller businesses do not have the ability to internalize one-time occurrences such as product liability litigation. While an event such as this might only increase the per unit price of a product sold by Exxon by a few pennies, the effects of unlimited liability upon a small business could be catastrophic.

That litigation—regardless of its merit—could force a smaller manufacturer from the market could be damaging to the economy if the pattern is repeated often enough. In a free market, the natural result of a decreasing supply coupled with a

141. *Toran Statement*, *supra* note 140, at *4.

142. *Id.*

143. In an attempt to limit liability of drug manufacturers, it has been suggested that those manufacturers who comply with all pertinent FDA regulations may not be named in a products liability action. *See generally id.* Incidentally, the Product Liability Reform Act of 1997 now before the Senate contains within it the "Biomaterials Access Assurance Act of 1997," which would limit the liability of the supplier of the raw materials used to make "lifesaving or life enhancing medical devices." 143 CONG. REC. S163-02, S229.

144. *Toran Statement*, *supra* note 140, at *13.

145. *Thornburgh*, *supra* note 88, at 1080-81.

static demand would be increased prices. Furthermore, if the product subject to the higher price is also subject to a high cross-elasticity of demand, a buyer will forego that product for a similar, less expensive one. In the long run, competitiveness in the marketplace is forfeited due to the increasing costs.¹⁴⁶

A final point that ties in with the above economic argument is the question of who bears the brunt of the increased costs caused by the current system. Professor George Priest has attempted to answer that question in his prepared remarks before Congress.¹⁴⁷ According to his statement, the current structure behaves much in the way that a regressive tax such as the sales tax hurts the consumer:

Research of my own currently in progress shows that low income consumers, if injured, are less likely to seek an attorney; even with an attorney are less likely to sue; less likely to recover; and again by definition, less likely to recover large damage judgments since their lost income is typically low and pain and suffering awards, which are highly correlated with lost income, equally low.¹⁴⁸

Furthermore, he contends that the poor also suffer more on the back end of a company's involvement in litigation. "Low income consumers have less money . . . and regardless of the product or service, are more seriously affected in terms of [their] purchasing power where price . . . increases. Low income consumers are forced to subsidize the high-income as expected . . . damage awards are built into the prices of products and services."¹⁴⁹ As the poor reach their reservation price and forego the product, competitiveness is once again diminished.

CONCLUSION

The purpose of this Comment has been to analyze the data both for and against the reformers' most recent incarnation of product liability reform, and make a determination as to whether this reform of the products liability system is desirable. At the close, we are perhaps no nearer a solid answer either way. Aspects of each side's respective positions can be justified on either policy or substantive factual grounds, yet neither seems to have the upper hand.

146. See generally Hovencamp, *supra* note 117, at section 1.

147. Priest Statement, *supra* note 89, at *18-19.

148. *Id.*

149. *Id.*

If the arguments presented herein have provided convincing evidence one way or the other, then the debate on this issue is closed. However, I would think that for the vast majority of readers, the debate continues to rage. What is more troublesome is that on an intellectual level, it is very hard to base a decision that seems so highly factual solely on a feeling of correctness. This ambiguity can only be increased by the knowledge that whichever decision is made, it is altogether uncertain whether a lady or a tiger lies behind the door.

From my humble perspective, I offer the reader my feelings on this subject, and the way in which I believe that the reform movement should proceed. Once past the rhetoric and noise of the realm of the political, several facts leap to the foreground. First, there has been a tremendous amount of work being done in the state legislatures that should not be overlooked. Any serious review of the substance of the tort reform legislation within the states should be adequate to convince even the most steadfast believers in the appropriateness of federal legislation that there is a wide area of basic agreement on major issues. At the same time, the American Law Institute is nearing completion on the Restatement (Third) of Torts: Products Liability. This further suggests that the positions of the various states are coalescing to a certain degree. The role of the ALI in this debate should not be too readily relegated to the backseat as the conclusions drawn therefrom may shed light on what areas may or may not be in need of reform. In this regard, the new Restatement could be seen as a guidepost for future legislation at either the state or the federal level. Furthermore, the fact that the Supreme Court has begun to refine its treatment of the issue of punitive damages leads one to believe that further uniformity can result by means other than federal legislation.

The insistence on national reform "without any comprehensive data to demonstrate that the legislation will work"¹⁵⁰ should be avoided.¹⁵¹ As state courts struggle to reconcile the meaning behind the wording of section 108 and other sections in the act which set national standards regarding products liability, an-

150. S. REP. NO. 69, at 80 (1995).

151. This statement is echoed by J. Robert Hunter in his testimony before Congress: Surely no case exists for massive intrusion on state's rights here . . . To the extent that a particular product has a high cost of product liability, Congress can look at that on a case by case basis, as it did for light aircraft manufacturers [in 1994] . . . There is simply no evidence of a need to alter the product liability system in an overall way.

Hunter Statement, *supra* note 126, at 91.

other consequence unfolds. Rather than nationalizing the standards, the individual state courts will necessarily devise their own interpretations based upon the needs of the jurisdiction. It will only be after a lengthy appellate review in the federal courts and eventually, the Supreme Court, that the intended effect of nationalizing products liability law will be achieved.¹⁵² Even disregarding the procedural dilemmas involved in this act, we must consider the extralegal effects this standard will have on our society.

The words of Justice Cardozo, uttered over 60 years ago about the dangers inherent in standard setting are still germane in this context today. In order to prevent unintended and unnecessary consequences, we would do well to heed his admonitions:

[I]llustrations such as these bear witness to the need for caution in framing standards of behavior. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal.¹⁵³

152. Of course, by the time this litigation reaches the Supreme Court, it is entirely possible that the standards set down by the PLFA will no longer be an effective means of adjudging products liability litigation.

153. *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934).

